POLICY CONTRACTS IN MARINE INSURANCE

By Solomon Huebner.

A contract of marine insurance has been defined as "a contract of indemnity, in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain amount, that may happen to the subject insured, from the risks enumerated or implied in the policy, during a certain voyage or period of time."[1] It is essential in a marine policy that the parties to the contract shall have undertaken the transaction in good faith. This is true of all contracts, but especially so of a contract of marine insurance where the risks assumed are not only very numerous, but also very complex in their nature. Moreover, all material facts must be stated to the underwriter, and fraud of any kind will nullify the policy. The misrepresentation or concealment of material facts with a view, for example, to deceive or influence an underwriter into accepting a risk or in fixing the premium will deprive the offending party not only of any premiums paid, but of all rights accruing from the policy.

Equally essential to the validity of a marine insurance policy is the requirement that the insured shall actually possess an insurable interest in the subject insured. Such an interest, however, need not necessarily represent ownership. As Mr. Justice Lawrence defined it: "To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of the thing and the interest derived may be very different. Of the first, the price is generally the measure; but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended."[2] This definition would seem to indicate that anyone pecuniarily interested in the safe arrival of a vessel or cargo

1 John Duer. "Law and Practice of Marine Insurance." Vol. I., p. 58.
2 Marine. William Gow, "Marine Insurance." Second Edition, p. 77.

has an insurable interest in the same. A mortgagee has an interest in a vessel to the extent of his mortgage which he may insure. A trustee or bailee possesses an insurable interest in property entrusted to him, as also does a consignee of goods who has advanced money against their value. Advances made for repairs to a ship at a port of refuge, which are to be repaid at the close of the voyage out of the ship's cargo and freight, give rise to an insurable interest. Those concerned in any profits to be derived from a venture have an insurable interest in them; and among the numerous other ways, besides ownership, in which an insurable interest may exist in a given subject, it is almost needless to state, is the interest which the marine underwriter, himself, possesses in the risks he has underwritten, and which he very frequently finds it desirable to re-insure.

Summarizing, then, the essential features of a marine insurance policy (following Mr. Gow's outline), it may be described as:

"(1) A contract of indemnity;

(2) Made in good faith (*in uberrima fide*);

(3) Referring to a defined proportion;

(4) Of a genuine interest in a named object;

(5) Being against contingencies definitely expressed, to which that object is actually exposed;

(6) And in return for a fixed and determined consideration."[8]

Various Kinds of Policies.

Directing our attention next to an examination of the various types of policies in use, we find that numerous titles are employed to designate them according to the subject matter insured. Thus among the various types of policies issued by American companies there are so-called "vessel policies," "vessel and freight policies," "cargo policies," "steamboat policies only," "tug policies," "stranding or collision policies only," "lighterage policies," "yacht policies," "whaling and fishing policies," "canal hull policies," "river cargo policies," " lake cargo and vessel policies," "cotton policies," "builders' policies," etc. While a comparison of these numerous policies in different companies shows that scarcely two are exactly alike, yet a closer examination, whether we regard vessel, cargo or freight policies, will indicate that they have all been adapted to the particular

[8] William Gow. "Marine Insurance." p. 11.

risk from a common form, and that, despite variations, the printed form of the contract is approximately the same as regards essential particulars. The only real difference exists in the adaptation of the contract to meet certain particular conditions and not in the essential form or content of the document itself.

As special circumstances may render one form of policy more desirable than another, marine policies may also be conveniently grouped into four classes according to the nature of the risk assumed, or the manner in which the policy is executed. Briefly stated, this four-fold classification depends, first, upon the manner in which the value of the subject matter of the insurance is expressed in the policy; second, upon the absence or presence in the policy of the name of the vessel which is to make the voyage; third, upon the period of time during which the risk is covered; and, fourth, upon the interest of the policyholder in the subject insured.

Under the first classification the policy may be either "valued" or "open;" a valued policy being one which stipulates some agreed value (not necessarily the real value) such as $1,000 worth of goods or a ship worth $50,000; and an open policy, on the contrary, being one which omits to specify the value of the subject insured, but leaves this to be ascertained when a loss occurs. The only real difference between the two is that in case of total loss, in the absence of fraud, the valued policy entitles the insured to receive the value specified in the policy without proving the loss, while the open policy makes necessary an adjustment as proof of the loss incurred. In case of partial loss, however, this difference does not exist, since the same adjustment must be made, irrespective of whether the policy is open or valued.

Similar to the two types of policies just named is the second classification, namely, that referring to the presence or absence in the policy of the name of the vessel for a particular voyage. Under this classification policies may be either "floating" or "named." By a floating policy is meant one which describes the limits of the voyage, the value of the property insured and the type or class of vessel to be employed, but does not specify any particular vessel. The policy, in other words, is stated to apply to any "ship or ships." The wording is thus made sufficiently broad to enable a merchant to insure his goods before he is able to ascertain the name of the vessel on which they will be shipped, or to give him protection in case of

loss before he is able to make a specific insurance. As soon, however, as the name of the vessel employed on the voyage becomes known to the insured, this information, together with any important attending facts, is "declared" to the underwriter and "endorsed" on the policy, thus making it a "named" policy instead of a "floating" one.

Under the third group there may be either "voyage" or "time" policies, the first denoting insurance for a specified voyage, as from New York to Liverpool, and the second referring to insurance for a period of time, usually one year. Lastly, we may have what is called an "interest" policy, or one clearly indicating that the insured possesses a true and substantial interest in the subject matter of the insurance, such as one hundred bales of cotton or a thousand bushels of wheat. In contrast to this type of policy is the "wager" policy, exceedingly novel in form, and of very limited use. As its name implies, it clearly shows that the holder has no insurable interest in the property covered by the policy, or that the underwriter, at least, will not demand proof of the same. One of the cardinal principles of insurance law is that an insurance policy, to be valid, must represent an insurable interest on the part of the insured. Hence in a wager policy it is customary to insert such expressions as "interest or no interest," "policy proof of interest" and the like, which mean to signify that by common agreement between underwriter and insured, the latter is entitled to the payment provided in the policy upon the loss of the subject insured, irrespective of the fact that he has no strictly insurable interest in the same. Owing, however, to the universal observance of the principle of insurable interest, it would be very difficult to collect on such a policy in any American court. In England, where such policies have been declared void by statute, they still continue to exist to a limited extent; their fulfilment, however, resting on the basis of so-called "honor" agreements.

Summary of Provisions in American Policies.

Marine insurance, as already noted in connection with the discussion of Lloyd's policy, has had a development of several centuries. Though introduced several hundred years ago, Lloyd's policy still furnishes illustrations of the quaint language of earlier days, and affords a just basis for the characterization, often made, that it is an

"incoherent and antiquated instrument." Yet, whatever may be said against the policy, because of its poor adaptation to the needs of modern commerce, is largely counterbalanced by the advantage of the certainty in meaning and the stability in marine transactions, which become possible through the use of a policy which has back of it several centuries of legal decisions, and which has acquired a more and more definite meaning until to-day nearly every word it contains has been interpreted by the courts. It is this desire to have a definite and interpreted document as the basis of marine insurance transactions which has, no doubt, been largely responsible for the fact that numerous features of Lloyd's policy have been incorporated and retained in American policies, and that the policies of the various companies should tend toward a fair degree of uniformity. Many important changes, it is true, have been introduced into American policies as compared with Lloyd's form, yet in some important particulars, like the enumeration of the perils against which insurance is taken, the influence of Lloyds is still clearly apparent.

In discussing the provisions of the marine insurance contract, as exhibited by an examination of the policies of nearly every American company of any importance, they may be conveniently grouped under the following six heads, viz., those which:

(1) Describe the general character of the subject matter insured, and the voyage to be undertaken.

(2) State the perils insured against.

(3) Refer to the losses arising from the perils against which protection is granted.

(4) Determine the liability of the underwriter in case other insurance exists on the same subject matter.

(5) Aim to protect the underwriter against fraud, unnecessary loss or undesirable risks.

(6) Have reference to "warranties" and "representations," and

(7) Express agreements in the form of "clauses" or riders.

The General Character of the Risk Assumed.

The general description of the subject matter insured, and the character and duration of the voyage are usually set forth in the opening words of the policy. No uniform wording has been adopted by all the companies in this respect, yet as representative of the con-

ditions usually provided, the following form is given as typical of American vessel policies:

BY THE .... INSURANCE COMPANY.

.....on account of .....
In case of loss, to be paid to
Do make insurance, and cause to be insured, lost or not lost, at and from the day of 190 , at noon, until the day of 190 , noon.

If on a passage at the expiration of the term, with liberty to renew the policy for one, two or three months, at the same rate of premium, if application be made to the company on or before the expiration of the first term. The risk, however, is to terminate at any port at which she may first arrive during the said extended time, on her being moored therein twenty-four hours in good safety; a pro rata premium to be returned for each entire month not entered of the extended time, there being no loss or other claims made. (Then may follow certain warranties and agreements.)

upon the body, tackle, apparel and other furniture, of the good called the whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, etc., hereby insured, are valued at

without any further account to be given by the assured, to the assurers, or any of them, for the same.

In the case of cargo and freight policies, while the form is similar to that mentioned above, the following provision is usually made with reference to the beginning and termination of the risk: "Beginning the adventure upon the said goods and merchandise as aforesaid, from and immediately following the loading thereof on board the said vessel, and to continue during the voyage aforesaid, until the property is landed."

The first features to attract attention in the above extract are the two expressions, "lost or not lost" and "at and from." Both were introduced very early into marine policies and both serve a

distinct purpose. The object of the first originally was, no doubt, to provide for those cases where the safety of a vessel was feared because of its having long been overdue and unheard from (a very common occurrence before the introduction of steam power, the telegraph and modern postal communication), and where insurance was therefore especially desired. Such cases occur to-day, and it also frequently happens that the owner of goods may have them exposed to the perils covered by a marine policy before he knows of their having been shipped, or before he has had opportunity to insure them. The real object of the phrase, then, is to have the policy cover a risk irrespective of the condition or position in which the ship or cargo may be at the time when the insurance is effected. To make the contract valid, however, both insured and underwriter must be in possession of the same facts, and neither must have knowledge concerning the condition of the risk.

In explanation of the second phrase, "at and from," it is important to note that there is a decided difference between insuring a ship and cargo "from" a port and insuring it "at and from" that port. The first insurance would cover a vessel, for example, only from the moment when it departs on her voyage, while the "at and from" insurance would cover the vessel not only while on the voyage but also at the port of departure before leaving. In case this is the home port, the insurance takes effect as soon as placed, and protects the vessel during the period of preparation for the voyage. In case the port is one to which the vessel has not yet arrived the insurance commences with the arrival of the vessel at that port if in safe condition.

Following the expressions just noted there are blank spaces for the insertion of the voyage, the period of time over which the insurance extends, the name of the vessel, and the general description and valuation of the subject matter insured. The presumption is that the voyage will cover the usual route and will be prosecuted without delay. If the policy is a time policy the date and hour when the insurance commences and ends must be specifically stated. In the case of goods and merchandise, it is expressly provided, that the policy covers immediately after they are loaded on board the vessel and continues during the voyage until safely landed. But where it is necessary to employ lighters in the process of loading, the risk of lighterage, except where otherwise provided, is also covered. In the case of a vessel the insurance either commences "from" or "at and

from" a port, and ends twenty-four hours after the arrival and safe mooring of the same at the port of destination. With respect to freight (the earnings of the ship for conveying the cargo) the insurance covers from the port of loading to the time when the cargo is safely landed; while in the case of a charter the insurance begins when it is effected and continues, irrespective of the fact that the vessel must load at another port, until the landing of the cargo.

With respect to the valuation of the subject matter insured two cases may arise. First, where the value is agreed upon, it cannot be reconsidered, unless a clearly proved mistake has been made or the relation of the assigned value to the real value is such as to afford just grounds for suspecting the existence of fraud or wagering. Where, however, the value is not stated in the policy, as in open and floating policies, it must be proved. In all such cases the insurable value attaching to various interests is ascertained in England and America on the following basis, subject, of course, to any provisions expressed in the policy:

"(*a*) Goods or merchandise: the prime cost (say invoice cost) plus shipping expenses and cost of insurance.

(*b*) Ship: the value at the commencement of the voyage, including the outfit, stores and provisions for crew, advances made against crew's wages and cost of insurance.

(*c*) Freight: the gross freight due to the ship on her arrival abroad plus cost of insurance.

(*d*) Other objects of insurance: the value to the assured at the commencement of the voyage plus cost of insurance."[4]

The Perils Insured Against.

Immediately following the general description of the adventure, the marine insurance policy specifies the perils against which protection is granted. In the policies of a few American companies, including the most important company, the enumeration corresponds exactly with the quaint enumeration of Lloyds, namely: "Touching the adventures and perils which the said . . . Insurance Company is contented to bear, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainment of all

[4] William Gow. "Marine Insurance." p. 67.

kings, princes or people of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel (or goods) or any part thereof." Most American policies, however, while retaining the language of the above clause in other respects, omit the specification of all perils except those of the sea, fire and barratry, and assume liability for all losses "to which the insurers are liable by the rules and customs of insurance in name of port, subject to the conditions and provisions contained or referred to by clauses in this policy." In the case of some companies, especially those insuring inland risks, the policy grants protection against the perils of the lakes, rivers, canals, railroads and all other losses or misfortunes except those arising from carelessness or lack of skill in loading or stowing the cargo or in navigating the vessel, or from other legally excluded causes.

A closer examination of the marine perils against which insurance is granted will show that they may be divided into four main classes, viz.: (1) those perils which have been appropriately called the "perils of nature," such as the "perils of the sea" and fire; (2) those enumerated perils which we associate with the conduct of those aboard the vessel, as jettison and barratry; (3) perils arising from the conduct of those not aboard the vessel, such as enemies, pirates, men-of-war, etc.; and lastly, (4) those perils referred to in the terminal clause, and including "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage" of the vessel or cargo. Of these perils many are self-explanatory and require no comment. Many, though very important at one time when travel was slow and dangerous and commerce subject to piracy and privateering, have become relatively unimportant to-day, owing to the introduction of the telegraph, modern postal communication and the numerous other changes which have completely revolutionized commercial facilities and methods. Four of the perils mentioned, however, may require a few words of explanation, namely, the "perils of the sea," fire, jettison and barratry.

The first term, it is important to notice, does not include all casualties that may happen to a ship or cargo on the sea. Not only must the loss be incurred in consequence of some peril which is *of* the sea, but, even where this is the case, it must be the result of an unforeseen occurrence, *e. g.*, an accident. It must not be in conse-

quence of occurrences which are inevitable in all navigation, such as the wear and tear produced by the wind and waves, or the inherent defects and natural deterioration of certain classes of articles. According to Phillips the term "perils of the sea" "comprehends those of the winds, waves, lightning, rocks, shoals, collision and, in general, all causes of loss and damage to the property insured, arising from the elements and inevitable accidents."[5] Likewise in the case of fire, the underwriter is liable for all losses arising from it, provided only that the cause was accidental and not brought about by any action of the insured for which he is considered responsible. Among the many causes of fire covered by the policy are lightning, spontaneous combustion and the damaged state of the cargo.

Jettison consists of "the throwing overboard of a part of the cargo, or any article on board of a ship, or the cutting and casting away of masts, spars, rigging, sails or other furniture for the purpose of lightening or relieving the ship in case of necessity or emergency."[6] This definition does not cover those cases where goods are jettisoned because of natural deterioration or inherent defects. Nor does it cover jettison of property due to the negligence or default of the owner; nor of deck cargo, except where expressly permitted in the policy.

Barratry, on the other hand, "comprehends not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship are, in fact, damnified."[7] As coming under barratrous acts, may be mentioned the scuttling of a ship, wilfully destroying or injuring a ship by running it ashore, setting it on fire, or abandoning it, or selling a vessel or deviating it from the true course of travel with the object of obtaining gain in some way. To constitute barratry, however, it is essential that these acts should be done against the better judgment of the ship-master and without the knowledge and consent of the owner.

Turning now to the terminal expression covering "all other perils, losses and misfortunes, etc.," it would seem that the under-

[5] Willard Phillips. "A Treatise on the Law of Insurance." Vol. I, p. 635.
[6] Frederick Templeman. "Marine Insurance: Its Principles and Practice." p. 33.
[7] Joseph Arnould. "On the Law of Marine Insurance." Vol. II, p. 952, Sec. 839.

writer is liable for losses arising from all causes not specifically mentioned. Apparently this phraseology includes all possible perils. Yet the real intent of the policy is to limit the liability of the insurer to losses resulting from causes similar to those enumerated before, *e. g.,* to those losses which are due only to accidental causes connected with the sea and which result from the action of the elements or from other overpowering and unavoidable occurrences, and not from any inherent defect of the subject insured or from natural causes such as deterioration, wear and tear, etc., in so far as they are inevitably associated with the usual prosecution of the journey.

The Losses Arising from Marine Perils.[8]

Having discussed the nature of the perils against which protection is granted, it is desirable that we should next inquire into the form which the losses arising from such perils may take, and the extent which the underwriter's liability may assume. Here we meet with a number of terms which appear again and again in a discussion of marine policy provisions, and which should, therefore, be now explained. These terms refer (1) to "total loss," which may be either "actual total loss" or "constructive total loss, and which involves a discussion of "abandonment"; (2) "general average"; (3) "particular average"; and (4) "salvage."

1. *Total Loss.*—"Actual total loss," as the term suggests, has reference to those cases where the subject matter of the insurance is completely destroyed or "missing," or is so badly damaged as to be of little or no value to the insured, or is taken out of the possession of the insured so as to completely deprive him of its use. "Constructive total loss," on the other hand, has been defined as occurring "when the subject insured, though existing in specie, is justifiably abandoned on account of its destruction being highly probable, or because it cannot be prevented from actual total loss, unless at a cost greater than its value would be if such expenditure were incurred."[9] To illustrate this definition we need only refer to a vessel which, having run upon rocks, has been but slightly injured and only requires to be released. Yet the cost of freeing her from her position

[8] For a brief and accurate account of what the various losses in marine insurance comprise in the case of ship, cargo and freight, see Frederick Templeman's "Marine Insurance: Its Principles and Practice." London, 1903.

[9] Frederick Templeman. "Marine Insurance: Its Principles and Practice." p. 45.

may be so large when compared with her value afterwards, that the attempt can only be characterized as a commercial failure. Hence it is that this and all similar cases are technically termed "constructive total losses;" and, if the facts of the case warrant it, the interests of the insured demand that he should give the underwriter of the risk what is called a "notice of abandonment." By this is meant that the insured claims payment for a total loss, and is willing to surrender to the underwriter all that remains of the property insured. If the underwriter accepts this notice of abandonment, he will pay the total valuation stated in the policy, and will seek, if practicable, to reimburse himself, at least in part, by recovering as much as possible of the property thus abandoned.

In the case of the vessel, "constructive total loss" exists whenever the cost of saving her from her position plus the cost of repairing her damages would exceed the value of the vessel when thus restored. In the case of a cargo such a loss may be declared when the goods fail to arrive at the port of destination, and when the cost of restoring any loss or damage and of forwarding the cargo to its final destination amounts to more than the goods are worth after thus repaired and forwarded. Lastly, in the case of freight, "constructive total loss" exists when the vessel or cargo is in such condition that to save the freight from actual total loss would require an outlay greater than the value of the freight would be after such expenditure is incurred. In all these cases it must always be remembered that both insured and underwriter must act without undue delay in giving and accepting the notice of abandonment, and that neither may wait to form an opinion by observing developments.[10]

2. *General Average.*—Turning next to a consideration of partial losses, the subject which claims our special attention is that of "average," which involves a discussion of the terms "general average" and "particular average." General average may be defined as covering all those losses which result from the sacrifice of any interest voluntarily and deliberately made by the master of a vessel in time of distress for the common safety of the ship, cargo and freight, and which must be repaid proportionately by all the parties benefited. Justice demands, for example, that if a shipowner cuts away his masts and sails, or voluntarily strands his vessel, or incurs expenses by putting into a port of refuge for the

[10] Frederick Templeman. "Marine Insurance: Its Principles and Practice." p. 45.

sake of preserving the cargo, he should not be obliged to bear the loss alone. Likewise, if an owner's cargo is sacrificed in quenching a fire aboard the vessel, or is thrown overboard to save the ship and cargo, it would be grossly unjust to make that owner stand all the loss. Hence the introduction of the principle that all such sacrifices should be compensated for by making them a charge upon the value of all the other interests involved.

In the case of the vessel a loss in general average exists only when any part has been destroyed in time of danger for the common safety, or when for the same reason it has been put to a use for which it was not intended. The cutting away and throwing overboard of masts, spars and sails, or the injuring of a steamer's propeller while attempting to extricate her from a dangerous position are a few of many illustrations that might be mentioned. While very complex cases for settlement may arise, which cannot here be discussed, the amount ordinarily collected in general average in all such cases is the reasonable cost of repairs, after deducting the customary allowance (usually one-third) which is granted as a commutation for the difference between old and new repairs. In the case of the cargo the amount allowed usually equals the net value which the goods would have brought when discharged, after deducting the charges for freight, landing, etc., which would have been incurred had the goods not been lost. If, however, the goods are merely damaged, the amount allowed is the difference between the net proceeds when sold and the value which they would have had if undamaged. When freight is lost the sum allowed ordinarily consists of the gross freight which the vessel would have earned had the goods been saved, after deducting (1) those charges which would have been incurred in order to carry the freight had the goods been saved, and (2) any freight which may be earned by carrying goods which are substituted at a port of call in place of those which were sacrificed. The various amounts thus ascertained are then levied upon the value of all the interests which were saved from destruction by the general average act. The ship, in case it is one of the contributory interests, contributes on the value she possesses upon arrival at port; the freight contributes on the net amount of freight saved; while the cargo contributes upon its net value at the port of landing. The guiding principle in making all these contributions is that the person whose goods were sacrificed should be placed exactly in the same

position as he would be if the goods of some other person had been sacrificed for the common safety instead of his own. To bring this about it is necessary that the sacrificed interest should also contribute its proper share. To return the sacrificed interest in full without claiming the proper contribution would mean placing the owner of the same in a favored position, since he would recover his property in full, while the other owners would be asked to make a contribution. Thus assuming the ship, cargo and freight were worth, respectively, $50,000, $25,000 and $1,000, and that $5,000 of this has been jettisoned, the following apportionment of general average would be made:

Total value contributing	$76,000	contributing to a loss of ..	$5,000
Property saved	71,000	contributes $^{71}/_{76}$ of $5,000 or	4,671.06
Property jettisoned	5,600	contributes $^{5}/_{76}$ of $5,000 or	328.94
Ship valued at	50,000	contributes proportionately or	3,289.47
Cargo, net value	25,000	contributes proportionately or	1,644.74
Freight, net amount	1,000	contributes proportionately or	65.79

In the foregoing discussion it should always be remembered that the liability for general average contribution and the right to claim it are matters which are entirely independent of marine insurance. If no insurance exists on any of the property involved, the respective owners must bear the contributions themselves. If, however, the property sacrificed is insured, then the underwriter becomes liable for the insured value, and by paying the same comes in possession of the right to receive the sums allowed in general average after deducting the contribution which applies to the interest he now represents. Moreover, if the contributing interests are insured, the underwriter is also liable for general average damage. But in determining the extent of his liability for such contributions, the insured value of the property must be taken into account. If the insured value is equal to the value of the contributing interests, the underwriter pays all the general average contributions; but if it is less, he only pays the contribution in the proportion which the insured value bears to the contributory value.

3. *Particular Average.*—This term comprises all partial losses occurring to the ship, cargo or any other interest in consequence of marine perils, and which do not come under general average. While

general average refers to losses arising from voluntary sacrifice, particular average almost invariably refers to losses resulting from accident. No sacrifice is made in particular average for the common benefit; no claim can, therefore, be made for compensation by general contribution. The loss must fall exclusively upon those who own or have an interest in the property lost or damaged, unless the same is insured, in which case restitution must be made by the underwriter.

Generally speaking, the underwriter's liability for particular average on hulls is measured by the reasonable actual cost of repairs after deducting "one-third new for old" (the allowance frequently made as a commutation of new for old), and after crediting the underwriter with the value of the old materials. In the case of a damaged cargo the liability is usually represented by the difference between the gross sound value of the goods and the gross proceeds obtained from their sale, the percentage of loss thus ascertained being then applied to the amount of insurance carried. In the case of freight the underwriter's liability is based on the insured value of the freight, and varies in proportion to the extent that the cargo is lost.

4. *Salvage.*—By salvage in marine insurance is meant the reward granted by law for services in saving life and property at sea. To be a true case of salvage, the service must have been of material assistance in saving the property, and must have come from third parties. The sum payable for the service is usually apportioned over the values of the various interests saved just as in the case of general average, and is recovered from the underwriter in exactly the same manner, provided the contributing interests are insured.

Other Insurance Upon the Same Subject Matter.

Closely connected with the subject of losses arising from the perils covered by marine insurance is that referring to the liability of the underwriter where the same subject matter has been insured with two or more companies. In England this problem is solved by granting the insured the right to collect indemnity from whichever policy he pleases, the underwriters on this policy in turn possessing the right to collect a ratable contribution from the other underwriters who insured the same risk. Thus where, without intention

to commit fraud, the same value is insured with two companies, the insured may collect the whole loss from one company, which in turn will collect from the other one-half the sum thus paid. Where the sum insured is not the same for both underwriters, the case is considered one of double insurance of the amount represented by the smaller of the two policies. In cases of triple or other multiple insurance, which is apt to happen where buyers, sellers, shippers and other interested parties may insure the same interest without knowledge of one another's action, the same principles apply as in the case of double insurance.

As compared with the above rules, the practice in the United States is totally different. Instead of permitting the insured to collect from any policy he may choose, the liability of the underwriter depends upon the date of his policy. If his policy is the first one taken and covers the value of the interest, then it alone must bear the loss. Only when the amount insured by the first policies fails to cover the value of the interest lost, do the later policies become contributors. In accordance with this principle practically all American policies provide that "it is hereby agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured, and the said insurance company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from; provided no return premium shall be made for any passage whereon the risk has once commenced. And in case of any insurance upon the said property subsequent in date to this policy, the said insurance company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made." Most American policies also stipulate that "other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith, and the company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance."

Policy Provisions Protecting the Underwriter Against Fraud, Unnecessary Loss and Undesirable Risks.

Having seen how the liability of the underwriter is determined in case the same property is insured with several companies, let us now examine those other policy provisions which aim to safeguard his interests. Much the larger portion of every policy consists of agreements with this special object in view. In fact, the number of such provisions (excluding "clauses" or riders which will be discussed later) in the policies of the leading American companies, is so large that if we should attempt a complete compilation at this time a full statement of the same would be clearly impossible. It will be endeavored, therefore, to present only those provisions which are constantly met with in an examination of the various types of policies issued by the principal companies. In doing this it is convenient to group them under the following heads:

1. *The "Sue and Labor" and "Waiver" Clauses.*—The universal employment of these clauses in marine policies justifies their reproduction in full, namely: "And in case of any loss or misfortune, it shall be lawful and necessary for the insured, his or their factors, servants or assigns, to sue, labor, and travel for, in and about the defence, safeguard and recovery of the said property, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute in proportion as the sum insured is to the whole sum at risk; and the acts of the insured or insurers in recovering, saving and preserving the property insured in case of disaster, shall not be considered a waiver or acceptance of an abandonment." The insured, in other words, practically agrees to exert himself in preventing or minimizing the loss of the insured property in the same manner that he would if uninsured. The underwriter, in turn, promises to bear all expenses thus honestly and prudently incurred by the insured in a proportion such that, if the policy covers the full value of the interest, he will pay all "sue and labor" charges. Both insured and underwriter then agree that no act of theirs, coming under the "sue and labor" clause, shall constitute a waiver or an acceptance of an abandonment.

2. *The "Memorandum."*—This clause may be defined as consisting of an enumeration of articles, arranged in groups, concerning which there is a limitation of the underwriter's liability for par-

ticular average. In its original form Lloyd's policy placed no limit upon the liability of the insurer. The development of the marine insurance business, however, and the growing complexity of commerce soon demonstrated that some limitation was essential. Hence in 1749 a clause called the "memorandum" was inserted, according to which the most important articles of trade were classified into three groups, and each group subjected to a definite limitation as regards the liability of the underwriter. A similar limitation was introduced in American policies in 1840, and to-day the memorandum is a conspicuous feature in every cargo policy. Indeed, so detailed has the memorandum become in some cases that in the policy of at least one important American company it limits the liability of the insurer with respect to one hundred and twenty specified articles or classes of articles. Changes have been made from time to time in the memorandum to meet the needs of commerce in different places, so that no uniformity can be claimed in respect to the articles enumerated in different policies. As illustrative, however, of the classes into which commodities are grouped, the following is given as the general form:

Memorandum.—It is agreed that bar, bundle, rod, etc., etc., ... are warranted by the assured free from average, unless general; cassia, matting, etc., ..., free from average under 20 per cent., unless general; East India hemp, etc., ... free from average under 10 per cent. unless general; bread, flax, etc., ... free from average under 7 per cent., unless general. Agricultural implements, etc., ... warranted free from claim or for any breakage, but liable for a total loss of a part if amounting to 5 per cent.

In ascertaining whether the memorandum percentages have been reached no consideration can be given to general average; nor can extra charges for proving the claim or making the survey be included in the loss in order to obtain the percentage. Regard can be had only to particular average, and if the claim here exceeds or equals the percentage mentioned, then the whole damage (not merely the excess) plus the extra charges must be borne by the underwriter. If, however, the actual value exceeds the insured value, the underwriter pays only a proportionate part of the charges, otherwise he pays all; while all charges incurred for saving and preserving the property are recoverable, as we have seen, under the sue and labor clause. In voyage policies it is permissible to make the insurer

liable by combining successive losses, each of which is less than the stipulated percentage. On the other hand, in time policies only the losses of one round voyage can be combined to determine the percentage, and not all losses incurred during the whole period covered by the policy. Moreover, in view of the increasing size in vessels and cargoes, it soon became apparent that although the percentage mentioned might be small, the absolute loss represented thereby might be unduly large ($5,000, for example, on a cargo of $50,000 under the 10 per cent. limitation). Consequently it has become common to subdivide risks as regards the application of the percentages. Thus, a cargo may be subdivided into "series," each "series" depending on the nature of the subject matter (as a certain number of bales for cotton or chests for tea, etc.), and the underwriter made liable where the loss in respect to one of these series reaches the proper percentage. Likewise, in the case of a vessel, separate valuations are often introduced for the hull, machinery, etc., with provision that the percentage rule should apply to each valuation separately.

Closely resembling the agreements in the memorandum are the provisions (some of which are at times included in the memorandum) usually found in policies and which grant exemption:

(*a*) From loss to goods "by dampness, rust, change of flavor, or by being spotted, discolored, musty or mouldy," unless caused by contact with sea-water and occasioned by sea perils.

(*b*) From loss by wet or exposure of goods shipped on deck; or for leakage of certain liquids like oils, molasses, etc., unless caused by stranding or collision.

(*c*) From loss of freight on articles like ice and lime, unless the entire quantity be destroyed because of stranding, sinking or fire; nor for loss of the articles themselves, unless occasioned by jettison, stranding, sinking or fire.

(*d*) From loss of specie, bullion, jewels, bank notes, deeds and the like, by providing that they "are not deemed to be included in any insurance unless specially mentioned in the policy and scheduled."

(*e*) From partial loss or particular average on a vessel unless amounting to a certain percentage, usually 5 per cent. net, of the value declared, exclusive of expenses in adjusting and proving the loss.

(*f*) From loss of freight or other interest than the vessel, unless amounting to 5 per cent. net, exclusive of expenses.

(*g*) From loss on account of wages or provisions, except in general average when customary.

(*h*) From loss ocasioned by jettison of deck cargo.

(*i*) From loss by breakage or derangement of machinery or bursting of boilers, unless caused by stranding, collision or fire.

3. *Subrogation.*—This is the right by which an underwriter becomes entitled to all rights and remedies which the insured himself could have exercised in respect to any loss. This right is always granted in marine policies, and the usual wording of the clause is as follows: "In case of loss under this policy it is expressly stipulated that the insurers shall be subrogated to all rights of the insured against any persons or corporations whose acts, negligence or default may have caused or contributed to the loss."

4. *Provisions Facilitating the Adjustment of Claims.*—Among such provisions most frequently used in American policies are those which stipulate:

(*a*) That in case of loss the company's agent must be represented on the survey if there be one at or near the place, and if not, then an agent of the National Board of Marine Underwriters, which agent must approve all bills for repairs or expenses.

(*b*) That in case of any dispute arising with reference to a loss on the policy, the matter may be submitted to arbitrators mutually chosen, whose award shall be final.

(*c*) That the insured shall give immediate notice of loss, together with an account of all known particulars and attending circumstances.

(*d*) That the company shall have free access at all reasonable hours to the books, accounts, instructions and correspondence relating to shipments and receipts covered by the policy.

5. *Statement of Acts Which Render the Policy Void.*—In addition to the general principle, already noted, that the misrepresentation or concealment of any material fact will vitiate a policy, it is customary in most policies to declare the contract void for one or more of the following reasons:

(*a*) "In case of any agreement or act, past or future, by the insured, whereby any right or recovery of the insured, against any persons or corporations, is released or lost, which would on accept-

ance of abandonment or payment of loss by this company, belong to this company but for such agreement or act, or in case this insurance is made for the benefit of any carrier or bailee of the property insured, other than the person named as insured."

(*b*) In case the policy, or the interest thereby is sold, assigned, transferred or pledged, without obtaining in writing the previous consent of the insurers.

(*c*) If any claim for loss arising under the policy is not prosecuted within one year from the date of happening.

(*d*) If a vessel upon a regular survey should be declared unseaworthy on account of being unsound.

6. *Miscellaneous.*—Under this head may be grouped the many scattered provisions, clauses and warranties which are found in examining a large number of policies. To enumerate them all is quite impracticable, and it will be endeavored, therefore, merely to indicate their nature by giving the principal groups under which they may be classified. In the main these groups are seven in number, and include:

(*a*) Those provisions which exempt the underwriter from loss arising from capture, seizure, detention or other acts of force; or which protect the underwriter from loss on account of illicit trade or trade in contraband of war; or which forbid abandonment except under certain specified conditions.

(*b*) Those exempting the underwriter from the payment of certain losses and expenses; or from paying certain repairs, such as the customary deduction of one-third from the cost of all repairs on a vessel, except where otherwise provided, as a commutation for the average difference between new and old.

(*c*) Those which forbid the insured to use certain ports, routes of travel, or areas of water, or else limit their use to certain months in the year.

(*d*) Those which prohibit, restrict or otherwise regulate the carrying of certain articles.

(*e*) Those referring to the collection or return of the premium, such as the right to cancel a policy and collect the earned premium in case of the bankruptcy of the insured, or the right to retain the whole premium in case the voyage is terminated before the expiration of the policy.

(*f*) Those arranging for payment of losses within thirty or

sixty days, as the case may be, after receipt of the proof and adjustment of the loss together with the proof of insurable interest, and after deducting all sums due the company.

(*g*) Those granting the ship-master liberty of action in time of danger, such as proceeding to another port in case the port of destination is blockaded, or in case the stress of weather or unavoidable accident makes this imperative.

Warranties and Representations.

The chief distinction between a "warranty" in a marine insurance policy and a "representation" is found in the strictness with which they must be fulfilled. Compliance with both is necessary to maintain the validity of the contract. In the case of the warranty, however, compliance must be "absolute and literal" or the policy becomes void from the moment of non-compliance, while as regards a representation "equitable and substantial fulfilment" is sufficient. In other words, a warranty is either as Arnould defines it, "A stipulation inserted in writing (or printed) on the face of the policy, on the literal truth or fulfilment of which the validity of the contract depends,"[11] or else it is as Gow expresses it, "A fundamental essential factor or condition inherent in each and every contract of marine insurance without exception."[12] A representation, on the other hand, is a statement in the policy less formal and severe than the warranty. The important thing connected with the representation is the determination of whether or not it is a material statement, *e. g.*, whether or not it has been one of the causes which led the underwriter to accept the risk, or influenced him in fixing the premium.

The term "warranty," as used to-day, may have two different meanings. In the first place there is the strict meaning of the term as exemplified by the definitions cited from Arnould and Gow. Among the warranties coming under this meaning, may be mentioned certain implied warranties of which more will be said later; or those which oblige the vessel, if trading to certain places, to sail within the time prescribed by specified dates; or which prohibit the vessel from carrying certain articles like combustible or injuri-

[11] Arnould. "Treatise on the Law of Marine Insurance and Average." p. 625. (Also in Gow's "Marine Insurance." p. 260.)

[12] William Gow. "Marine Insurance." p. 260.

ous chemicals, etc., or from taking a certain course, or from trading in certain prohibited areas; or which forbid loading the vessel beyond a certain limit with specified articles. On the other hand, the term "warranty" is often spoken of as referring to statements which are opposed to the usual provisions of the policy and which aim to relieve the insurer from certain losses for which he would otherwise be liable. Among such statements, commonly found in policies, are those freeing the underwriter from loss on account of capture, seizure or detention by any power or persons, or loss arising from abandonment under certain conditions, or in consequence of jettison of certain articles, and a host of similar provisions (often including the memorandum and the "free from particular average" clause) too numerous to permit of mention here. Such provisions are frequently introduced by the words "warranted free from," and have consequently acquired the name of "warranties," a practice, no doubt, favored by underwriters, because the term "warranty" if applied to statements favorable to the insurer would, owing to the strict interpretation attached to the term, be more apt to render their fulfilment certain by the insured.

Viewing warranties from another standpoint, they may be either "expressed" or "implied," according as they are written or printed on the face of the policy, or are of such fundamental importance that their force is universally acknowledged in marine insurance without appearing in any policy. "Expressed" warranties need claim but little of our attention, since the warranties cited above belong to this class. But when we come to consider "implied" warranties we reach a subject which underlies and vitally affects every contract of marine insurance. In fact, the conditions of these "implied" warranties must be present in every risk before any policy can be legally enforced, and non-compliance with any of their provisions will render the policy null and void. Briefly stated, implied warranties are three in number and provide:

1. That the vessel must be seaworthy in all respects for the intended voyage at the time of starting. This implies that the vessel must be in proper condition as regards the hull, machinery, rigging, the supply of fuel and provisions, the size and stowage of the cargo, the efficiency and sufficiency of the crew, and in all other particulars which, in view of the ordinary perils apt to be encountered, are essential in successfully prosecuting the voy-

age and carrying the cargo described in the policy. If the voyage is to be divided into several separate stages, this warranty applies at the beginning of each stage. Moreover, when a different equipment is necessary for one stage of the journey, as compared with another, where, for example, part of the voyage is by river and part by sea, the warranty is nevertheless applicable as regards each stage.

2. That the vessel will proceed in the usual way, directly and without deviation or unnecessary delay, from the port of departure to the port of destination. Only where deviation is permitted or required by the policy, or made necessary by overpowering circumstances or the desire to protect human life or aid in saving a vessel in distress or the subject matter insured, or where non-compliance is due to barratry of the master and mariners, and this is covered by the policy, is there a justifiable excuse for failure to observe this warranty. And where any deviation has occurred and the cause has disappeared, it is essential that the vessel should without undue delay resume the proper voyage. Failure to do so will be construed as another deviation, and will nullify the policy.

3. That the adventure shall be legal in all particulars. This implies that the vessel will conform with all legal requirements regarding her papers and will refrain from engaging in any unlawful trade.

All these implied warranties will appear just upon reflection, and the public interest demands that they should be observed. Yet, despite their importance, it is only in recent years that they have been given full effect. The original bills of lading used in shipping cargoes did not exempt the carrier from responsibility for loss or damage unless resulting from unavoidable causes. From time to time, however, this responsibility of the carrier was limited through the insertion of stipulations in bills of lading, providing against responsibility for loss resulting from the unseaworthiness of the vessel, negligence of master or crew, and other avoidable causes. As the decisions of the courts subjected the carrier from time to time to new liabilities, additional clauses were introduced into the bills of lading to obviate these decisions. As a consequence the responsibility of vessel owners was reduced to a minimum, and conditions remained in this shape until the year 1893 when Congress passed the so-called Harter act. This act nullified every agreement seeking

to relieve the carrier from responsibility for loss caused by negligence or failure in properly loading and caring for the freight, and at the same time provided that if the ship-owner would render the vessel seaworthy in all respects, no responsibility was to attach to any loss which arose from error in navigating or managing the same.

Clauses in General Use.

Having stated the main provisions common to marine policies in the United States, we come now to a most difficult feature to explain in connection with such contracts, namely, the almost endless variety of clauses or riders attached to policies in order to express special arrangements entered into by the contracting parties with a view of changing or supplementing the provisions contained in the printed policy form. These clauses are usually either printed, written or stamped in the margin of the policy, and very frequently, to make their importance conspicuous, are introduced in red print. Frequently these clauses are also expressed as warranties. But whatever the form in which they may appear, or however contrary to the printed portion of the policy they may be, they are nevertheless binding upon the parties to the contract, in view of the principle that any writing in the policy or any printed clause attached thereto is regarded as a special agreement, and as taking precedence over the printed matter in the main body of the policy itself. Owing to the exceedingly large number and variety of such clauses in use, it is next to impossible to attempt an enumeration of them all. How large the number is may be judged from the fact that Mr. Douglas Owen in his effort to collect and classify them in his work on "Marine Insurance Notes and Clauses" required a volume of over two hundred and fifty pages. Despite their number, however, there are some clauses of such frequent use as to deserve special mention.

1. *The Collision Clause.*—This clause first came into general use after 1836, in which year it was decided by a British court that an underwriter was not liable under the ordinary wording of the marine policy for damages caused by the insured vessel to another vessel through collision, even though the insured vessel was at fault. Hence, although the damage suffered by the insured vessel through collision is covered by the marine policy, it became necessary, in view of this decision, to make a separate contract whereby the under-

writer would agree to assume liability for the damage caused to the other vessel. Accordingly it became common to insert a clause which made the insurer liable for all or a portion of the damage thus incurred, and to-day the use of the so-called "collision clause" has become well-nigh universal. Its general use and great importance will justify its reproduction here in the form in which, with few exceptions, it is found in American policies, viz.:

It is agreed, that if the vessel hereby insured shall in consequence of collision with another vessel, become liable to pay, and shall pay, any sum or sums for damages resulting therefrom to said other vessel, her freight or her cargo, in such cases this company will contribute towards the payment of three-fourths of the total amount of said damages in the proportion that the sum insured under this policy bears to the total valuation of the vessel as stated herein, provided that this company shall not in any event be held liable under this agreement for a greater sum than three-fourths of the amount insured under this policy.

And it is also agreed that this company will bear a like proportionate share of the costs and expenses that may be incurred in contesting the liability resulting from said collision, provided the written consent of the company to such contest be first obtained.

But under no circumstances shall this company be held liable for any contribution in respect of any sum that the assured may be held liable to pay, by reason of loss of life or personal injury to individuals in any cause whatsoever.

2. *The "Free from Particular Average Clause,"* which signifies that the insurer is not liable for loss resulting from particular average. In most cases provision is made that the clause shall not apply "unless the vessel be stranded, sunk, burned or in collision"; while some companies use the phrase, "unless caused by the perils enumerated."

3. A clause exempting the underwriter from loss "on account of capture, seizure, detention or destruction by or arising from hostile forces, civil commotions, riots, or by the acts of officers or other persons acting in the name of belligerents, or in pursuing warlike operations whether before or after declaration of war." The risks growing out of war, as has been said, are "deemed greater than all the perils enumerated in the policy."[13] Thus by inserting the above clause the underwriter relieves himself from liability on account of a risk which in itself would require a very substantial increase in the premium charge.

[13] A. A. Raven. In Yale Insurance Lectures. 1903–04. p. 193.

4. Among the numerous other clauses in use, which might be mentioned, are those which provide that all risks insured are to be considered as underdeck unless otherwise specified; which prohibit the insured from trading in certain places or from carrying certain commodities; which grant the vessel certain liberty of action in case of certain contingencies; or which relieve the company from being answerable for certain defined losses, or for damage arising in consequence of specified actions or events.